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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ROBERT VANHERBERT,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The Ninth District Court of Appeals
For Summit County, Ohio

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69 pgs.

QUESTIONS PRESENTED

I

Whether due process requires a court reviewing the disposition made by the trial court of a Motion to Suppress to disapprove the search made if the affidavit for the warrant failed to set forth probable cause.

A. Whether due process requires a court to grant a suppression motion when the proof shows the affidavit failed to set forth probable cause.

B. Whether the simultaneous entry in all the outside doors of a home to execute a search warrant for narcotics can be justified as an exception to any knock-notice requirements.

C. Are police officers allowed to seize property seen during the execution of a search warrant on the basis of their mere belief that such property could be connected up to some criminal activity?

D. Can evidence seized outside the ambit of the property described in the warrant be justified on the basis of good faith where a reasonably well-trained officer should have known such seizures were not authorized?

E. Whether the intentionality and flagrancy of false and misleading statements inserted in a warrant for the purpose of influencing its issuance should be specifically dealt with by a court charged with reviewing the legal issues involved.

II

Whether due process is denied an accused when the court, despite a specific request, fails and refuses to articulate on the record the essential findings it relied on in determining, e.g., (a) that probable cause existed for the issuance of the warrant, (b) that an entry was lawful and (c) that certain monies, and other property, seized from the home and from the accused was constitutional.

III

Is due process denied an accused when he is convicted on the basis of proof that is insufficient to support a finding of guilt beyond a reasonable doubt?

IV

Whether due process is afforded an accused when the prosecutor wilfully makes an egregious argument which misinforms the jury on an issue critical to the defense.

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vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE NINTH DISTRICT COURT OF APPEALS

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The Petitioner, Robert VanHerbert, respectfully prays that a Writ of Certiorari issue to review the judgment of the Ninth District Court of Appeals, which judgment became final on May 13, 1987.

OPINION BELOW

The judgment entry of the Supreme Court of Ohio denying further review is set forth at Appendix "A" in the Appendix to this Petition, at page A1.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this Petition is directed, is designated Appendix "B", at page A3.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals was entered on May 13, 1987. The Ohio Supreme Court denied further appellate review on September 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved in this

case are:

(1) Fourth Amendment, United States Constitution;

(2) Fourteenth Amendment, United States Constitution;

(3) Revised Code of Ohio, §2925.03 and §2923.24.

STATEMENT OF THE CASE [1/]

Robert VanHerbert, the petitioner herein, was convicted by a jury on one count of Aggravated Trafficking In Narcotics in violation of R.C. of Ohio §2925.03. He was sentenced by the Court to serve an enhanced sentence of 5-15 years and fined five thousand dollars ($5,000.00).

Prior to trial the defense moved to suppress and for the return of certain illegally seized evidence. Here proof

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1/ References to the Transcript of Proceedings will be designated by the prefix Tr. References to the Transcript of the Suppression Hearing will be designated by the prefix SH.

ultimately showed that "a couple of days before the actual search" (Tr., 48), which occurred on November 1, 1985, the police were already preparing to conduct the search we are here concerned with. The Record also shows it was on October 30, 1985 (or earlier) that Sgt. VanPelt told Detective Smith that he (Smith) "would be assisting in this search" when made (Tr., 49). This, of course, is what eventually happened.

What makes the above proof so very significant is laced to the testimony of Robert VanHerbert and Royal Feaster. Their evidence magnifies fatal flaws in the trial judge's refusal to declare the search warrant affidavit here to be what it actually is -- a false affidavit.

Here critical segments of Robert VanHerbert's testimony and that of Royal Feaster showed they returned to Akron,

Ohio from San Francisco, California in the early morning hours of November 29, 1985 (SH 29, 38 & 48). Significant too is the insuperable proof that the defendant did no more than drop Royal Feaster off at the Delia Avenue address before proceeding to his own residence located elsewhere. The only person he encountered in the Feaster home was Alvira Brown, a friend of Royal Feaster who had babysat her daughter for the days Feaster and VanHerbert were in California (Tr., 38-39). Other indisputable defense evidence verified the inescapable conclusion that flows from the above facts.

Also, the facts bearing on the Suppression Motion show the affiant and his fellow officers simultaneously forced their way through all three of the entry doors into this home. And, it shows

these officers entered in a fashion that can be likened to the method of a Gestapo (SH 75-78). Also, it happened that once inside they arrested, on their own authority, all of the people on the premises (SH 79).

Although Detective Miksch claimed to be aware of the "limitations on the search warrant" (SH 81) in this case, which was to search for evidence of "drug trafficking" (ibid), the police called in a burglary squad officer and others to inspect all of the property (i.e., furniture, televisions and the like) on the premises to see if any of it was stolen (SH 82-85). And, this officer conceded that the standard used in seizing certain property turned on whether the seizing officer merely "felt" (SH 87) it "related to drug trafficking" (SH 87). In other words, as this officer

saw it, he could rightly take "what he feels he can take ..." (id., 87-88). Simply put then, property can be seized virtually at will by the police (id., 88). (In other words, according to the affiant in this case the officer executing a warrant would be justified in seizing property "if it is authorized in ... [the] warrant or if they feel its evidence of a crime" [SH 88]).

II

In assaying the contention here that the evidence was not sufficient to support a finding of guilt beyond a reasonable doubt and that the defense's proof (as to who actually owned this contraband) was not improbable and was reasonably believable, certain facts are indeed critical. These include the fact that the appellant's son, Brent Hubbard, admitted and explained his possession and

ownership of the contraband. And, he admitted ownership and possession of various other drug implements that were found in his duffle bag located in the basement. Indeed, Hubbard's identification of these various items was done under circumstances that really verify his totally thorough familiarity with all this property, which included the scales and other items, was obviously not contrived (See, Tr., 282-285 & 305-307).

In a nutshell then, Hubbard's evidence fully accounts for all the contraband found on the premises that was used as evidence and for that which our petitioner was actually convicted for possessing.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

Normally, and it is expected, a reviewing Court will credit the testimony

of a police officer. This is what, unfortunately most Judges routinely do, and, what was done in this case. But no Court is compelled to accept the testimony of any witness. Indeed, there are situations, such as we have here, where the critical police testimony is simply too weak and too incredible to accept. This is particularly so when it is rendered by police officers who assertedly had received special training and who cannot be presumed to have acted other than intentionally -- both, in their conduct and in their testimony designed to justify it.

All this being so, any argument that the affiant here believed he had probable cause not only defies reason, but commonsense as well. The same would likewise be true of any assertion that these officers were refused admission

before they broke into and wilfully damaged and ransacked this home. The bottom line then is that all of the arguments made below, under the various topics, show a type of illegal conduct by the police that renders the trial and Appellate Court's findings to the contrary invalid and unexceptable.

ARGUMENT NO. I

Due Process And Fundamental Criteria Require Courts Reviewing Motions To Suppress To Disapprove The Search Where The Proof Shows The Warrant Involved Was Acquired On The Basis Of An Affidavit That Failed To Set Forth Probable Cause.

The central argument made here is that our Motion To Suppress ought to have been granted for the reasons originally argued in support thereof. These arguments, however, become even more

manifest when one is forced to also reckon with the evidence developed at the trial. See, Dibella v. United States, 369 U.S. 121 (1962); United States v. Jones, 438 F.2d 461 (7th Cir. 1971); Cogen v. United States, 278 U.S. 221 (1929) and Rouse v. United States, 359 F.2d 1014 (5th Cir. 1966). In any event, the State's response will show its usual penchant for relying on the realistic assumption that regardless of the feebleness of its assertions as to the presence of probable cause, State v. Haynes, 25 Ohio St. 2d 264 (1971), and even the apparent mendacity of the police officer most critically involved, State v. Hunt, 22 Ohio App. 3d 43 (1984), State v. Dodson, 43 Ohio St. 2d 31 (1974) and State v. Welch, 18 Ohio St. 3d 88 (1985), surely this Court will somehow find a way to favor their position.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Next, we concede that the duty of a reviewing court in dealing with challenges to the sufficiency of search warrant affidavits, of the nature and type utilized here, "is simply insure that the magistrate had a substantial basis for concluding that probable cause existed". Illinois v. Gates, 462 U.S. 213 (1983). The facts show the consequential point here is our affidavit made only one significant factual assertion. This reference is to the affiant's cryptic statement that:

> ... within three days prior to ... [November 1, 1985 at 11:00 a.m.], the information source was on the premises at 994 Delia Avenue, Akron, Ohio ... and while there saw a quantity of a white powder believed by the source to be cocaine in the possession of Robert VanHerbert ... (Emphasis supplied.)

The important point here, which most of our judges and prosecutors fail, or

refuse, to recognize is that despite Gates, there are certain constitutional concepts that must be reckoned with. And where, as here, the sole basis for the claimed existence of probable cause rests on an informant's tip, the assertions relied on by the affiant must be viewed with circumspection. In this regard, careful consideration must still be given to the informant's credibility and reliability.

Here, the assertion of reliability was in the most conclusory form imaginable. Simply put, it was of less substance than the tired "boiler plate" allegation that the source had supplied reliable information in the past. (What the Affiant said in this regard was that the "source" possessed information that was corroborated by the Affiant, not about VanHerbert, but about the

possession and sale of drugs in Akron -- a really big deal.) Still, the information source was only credited with believing a substance supposedly seen by him in VanHerbert's possession was cocaine. And, the proof shows (if this did in fact occur) it had to have been two (2) days or more before the search had actually occurred. Cf., United States v. Scott, 555 F.2d 522, 528 (5th Cir. 1977).

A. Due process and fundamental criteria require courts to grant Motions To Suppress where the proof shows the warrant involved was acquired on the basis of an affidavit that failed to set forth probable cause.

The showing made in this Petition fully demonstrates that the warrant obtained herein was the product of the affiant's wilful resort to outright falsehoods and to the intentional and reckless misstatements of facts. These

were undeniably designed to mislead and convince the Court (issuing the warrant) that probable cause existed to search this home for a literal plethora of property. The contention also being specifically made is that no probable cause for any type of search existed. And, just as surely none was set forth in the affidavit.

To begin with, the affidavit provided absolutely no basis for believing that evidence of any sales of cocaine, or trafficking in cocaine, would be present in the home. This distinction is critical because a warrant pertaining to drug sales could very well serve as a predicate for an authorization to search for "records and documents" and evidence of drug transactions. On the other hand, a warrant based on mere drug use or mere possession of drugs by an occupant would not.

In dealing with this specific contention the Court of Appeals made the absolutely incredible statement that VanHerbert does not contend that the factual statements contained in officer Miksch's affidavit are inadequate to establish probable cause. Rather, he argues that Officer Miksch lied about the existence of a confidential informant. Appendix "B", infra, A7-A8. Not only was the above quote indefensible because the precise arguments made above were in the Brief below, the issue was also addressed in the Appellant's Reply Brief filed in the State court.

B. The simultaneous entry (through doors located on various sides of the building) into a private home to execute a search warrant must be justified as an exception to the knock-notice requirements.

At the outset, certain undisputed facts must be noted. The officers executing this warrant forcibly (Tr., 75)

entered all three of the outside doors of this home (Tr., 76). And, it seems clear enough there was no evidence that anyone in the home including the two visitors seated inside (Tr., 81), was aware of the presence of the police before they broke in. Indeed, the testimony by officer Miksch that he did not "know if anyone inside heard" them, or was otherwise aware they were outside (Tr., 77), makes it clear he could not have believed the police had been refused admittance as is required by R.C. of Ohio, 2935.12. See, Sabbath v. United States, 391 U.S. 585 (1986). Also, this officer testified he only waited at most "a matter of a few seconds" (Tr., 78) before breaking in.

When considered in the light of the testimony of Detective Kovein (that upon entry he immediately ran up the steps and he saw the defendant coming out of the

bathroom) it can hardly be denied that VanHerbert was unaware of the presence of anyone wanting entry into this home until after the fact. We concede that where exigent circumstances are present it is not unconstitutional for the police to fail to comply with knock-notice requirements. Still, it is the law that in dealing with the matter of forcible entries of the type here involved, the nature of the purpose sought to be achieved by the warrant is but one of a number of relevant circumstances to be considered. Simply put, the — easy disposability of drugs would be but one such factor to be considered in determining whether the entry was reasonable.

On the other hand, the fact that the warrant involved in this case sought narcotics does not alone constitute an

exigent circumstance. See, People v. Quellette, 78 Ill. 2d 511, 410 N.E. 2d 507 (1981) and State v. Harris, 12 Wash. App. 481, 530 P. 2d 646 (1975). This point seems especially apt here since there was no allegation in the affidavit that the cocaine and the "records and documents" sought by the warrant were located in a place or places that made them instantaneously disposable. Also see, State v. Smith, 202 N.E. 2d 215 (Cuy. Cty., C.P. Ct. 1964), which rejected the proposition that the special nature of narcotics created, for officers involved in such an investigation, powers in excess to those that regulate other law enforcement officers. Here is was said that the "Fourth Amendment applies to the same degree and with equal force to persons suspected of dealing in narcotics as it does to persons suspected

of dealing" in other illegal matters. Smith, 208 N.E. 2d at 222.

The upshot of this analysis is the entry made here offended the Constitution and these officers had to know this was so. Despite these indisputable facts, the Opinion below held that when search is authorized for narcotics the requirements of our knock-notice statute (R.C. of Ohio, §2935.12) need not be complied with. Simply put, no additional circumstances must occur, exigent or otherwise, as the authorization to search for narcotics is alone sufficient. Indeed as put by the Court, "because narcotics are easily disposed of [t]his fact alone constitutes an exigent circumstance...." Journal Entry, 4-5.

Implicit in the Court's flawed, conclusory and untenable analysis of the knock-notice issue in this cause is the

tenuous assumption (which is not even arguably defensible) that the word narcotics in a search warrant is properly regarded by the police as a sort of "talismanic" word. And that as such it automatically eliminates any requirement that Ohio knock-notice statutes be observed by local police before they make a forcible entry to execute a warrant.

In all this it certainly should not go unnoticed that the Court of Appeals' summary resolution of this issue is proof positive of an obvious unwillingness to empirically address a most critical issue in this appeal. Actually it does more than that, the Court's failure to deal on an informed basis with a dispositive issue in this appeal is truly unfortunate -- as it would be in any case.

C. The police are not licensed to seize property seen during the execution of a search on the basis of their feelings, or

> because they felt like doing so; the seizure of any property not named or described in a warrant must be justified by the police under the Plain View Doctrine.

The determinative facts bearing on this issue are clear beyond dispute. These officers went far beyond the scope of their warrant, which ostensibly related to a "white powder" supposedly seen in VanHerbert's possession that the informant merely believed to be cocaine. Yet, in conducting their search, and in the wake thereof, these officers seized property on their own authority. Specifically, some of the seizures were on the basis of the officers' incredible belief that, as police officers, they could do so if they merely felt, or had the feeling, any items so seized could possibly be related to drug trafficking. See Tr., 87-88 & 93-94.

Even this is not all, apart from the incontrovertible fact that items were

seized here that cannot possibly, even now, be regarded as evidence of criminal activity; it seems clear enough these items did not on their face evidence any such activity. See, Texas v. Brown, 460 U.S. 730 (1983). Under Brown, the seizure of property under the "plain view doctrine: requires (not a feeling, the case here, but) 'probable cause to associate the property with criminal activity'". Id., 741-742.

Quite possibly the hollow and specious argument will be made that the generic description "money" satisfies the particularity requirement of the Fourth Amendment and thus validates the "money" seizures in this case. The short answer to this surface argument is provided by such cases as United State v. Klein, 565 F.2d 183 (1st Cir. 1977) and Montilla Records of Puerto Rico, Inc. v. Morales,

575 F.2d 324 (1st Cir. 1978). These cases correctly articulate the principle that while warrants of this type can be read in the light of the affidavit, they must also give the executing officers sufficient information or directions to enable them to distinguish between contraband and legitimate (i.e., non-contraband) items of property and goods. Klein, 565 F.2d 188-190; Montilla Records, 575 F.2d at 326. Our warrant fails this test as well.

Here again our Court of Appeals chose to make only a passing reference to a very serious issue. This it did by failing to demonstrate anything other than a penchant for giving the police all the breathing room it lays claim to.

D. The State's burden of proving evidence seized outside the scope or ambit of a search warrant cannot be satisfied on

the basis of good faith where a reasonably well-trained officer should have known such seizures were not authorized.

Based on certain very fundamental tenets, which the officers in this case knew or should have known about, it was simply not reasonable for them to believe that probable cause existed for the search warrant. And, just as surely, it was not reasonable for these officers to believe they could seize non-contraband property of the ilk involved in this case on their own authority. This must be so because any "reasonably well-trained officer[s] would have known that the search was illegal despite the ... [court's] authorization". Leon, 104 S. Ct. at 3421, n. 23. Even this is not all, the objective standard mandated in Leon requires police officers "to have a reasonable knowledge of what the law prohibits". Id., 3420, n. 20. This

being so, what happened here proves these officers wilfully acted in defiance of the law.

E. Where false and misleading statements are wilfully inserted in an affidavit, for the purpose of influencing the issuance of a warrant, the intentionality and the flagrancy of such misconduct must be specifically dealt with by any Court charged with reviewing the legal issues involved.

The false statements in this affidavit relative to the asserted observations by the alleged informant were proven to be a total fabrication in the light of evidence showing it to be impossible that any informant was inside this home at the time indicated. Also, the allegations in the affidavit were obviously designed and crafted to conceal the fact that the informant was at best an anonymous person, or at worst, a phantom. Such allegations would surely

result in at least censure, or a finding of contempt, if made by a lawyer to any court. So why should it be different simply because they were made by a police officer?

ARGUMENT NO. II

Due Process Is Denied An Accused When The Court, Despite A Specific Request, Fails And Refuses To Articulate On The Record The Essential Findings It Relied On In Determining, e.g., (A) That Probable Cause Existed For The Issuance Of The Warrant, (b) That An Entry Was Lawful And (c) That Certain Monies, And Other Property, Seized From The Home And From The Accused Was Constitutional.

In this case, the critical issues raised by the Motion to Suppress included whether the affidavit set forth probable

cause, whether the affiant had resorted to lies, wilful falsehoods and deceptive and misleading allegations, whether the police lawfully entered the premises, whether the seizures made were valid, whether there was the required nexus (i.e., between the seizures authorized and certain property confiscated). And, whether the officers could circumvent fundamental criteria by the outright confiscation of certain monies on their own authority.

Here, of course, these issues were postured by facts showing the seizure of property not described in the warrant was made, not on the basis of probable cause; rather some of this property was taken because the officers felt, or had a feeling, the property could possibly be connected up to drug trafficking. On each of these points the trial court

summarily rejected our contentions. The Court of Appeals did no better. On the other hand, that Court addressed our complaint by simply torturing the Record, which shows a specific request for the findings required by Rule 12 (E). See Tr., 195.

In this appeal we are concerned with the trial court's summary rulings made with reference to the petitioner's Motion to Suppress and with reference to the request for the return of certain property. Here, the Record shows the Court, as is the practice of most of the trial judges in Ohio, effectively concealed the basis for its ruling denying the Motion to Suppress. Cf., United States v. Barletta, 644 F.2d 50 (4th Cir. 1981). In Barletta, the Court articulated the idea that a party could, on the basis of Rule 12 (e) Federal Rules

of Criminal Procedure, compel the Court to "set forth specific grounds supporting a finding" made in connection with a comparable pre-trial motion. Since our Motion specifically sought the findings required by Rule 12 (e), and counsel specifically requested the Court to articulate his findings on the Record in taking exceptions to the Court's conclusory and summary ruling, the Court's failure to do so is magnified into a due process violation. See, Sims v. Georgia, 385 U.S. 538 (1967).

The cogency of the above point is magnified by the fact that in many of these areas there is really no assurance that merely because the ultimate fact-finder carries the title "Judge," this somehow makes him, or her, conversant with any or all of the complicated tenets in this particular

area of the law. And, just as surely it does not follow that all Judges are appropriately informed to an extent that we can naturally assume they did the right thing.

ARGUMENT NO. III

Due Process Is Denied An Accused When He Is Convicted On The Basis Of Proof That Is Insufficient To Support A Finding Of Guilt Beyond A Reasonable Doubt.

A fair distillation of the facts in this case at best only shows our petitioner's mere presence in the home when the contraband was located during the execution of the search warrant. No specific evidence linked Robert VanHerbert to this contraband. And, the petitioner's son categorically admitted: (1) the contraband's presence in this home was solely his responsibility, and

(2) that it was solely his property. The evidence bearing on this issue was not only unimpeached, but can in no way be regarded as unreasonable.

The controlling law in Ohio on the unlawful possession and the tenets of constructive possession were cogently expressed in State v. Haynes, 25 Ohio St. 2d 264 (1971). What Haynes requires is that to support a possession conviction, the proof must establish both knowledge of the presence of the charged contraband and, in addition, custody and control thereof by the accused.

Significant here, the State must rely on a cryptic statement, supposedly made by the accused -- that he had forgotten about the contraband (or some of it) being in the house. When this evidence is evaluated in the light of reason and reasonableness it seems

clearly to be that such proof is really more of the type of fabrications most drug enforcement officers seem capable of asserting without reservations. See, e.g., United States v. Marshall, 488 F.2d 1169 (9th Cir. 1973), and State v. Hunt, 22 Ohio App. 3d 43 (Cuy. Cty., 1984). Also see, State v. Dodson, 43 Ohio App. 2d 31 (Cuy. Cty., 1974), where as occurred in Hunt, supra, outright perjury was indulged in by the officer-affiant involved in those cases with impunity.

Again, the law seems clearly to be that to qualify VanHerbert for a possession conviction, which essentially was the charge made here, the proof should have established that VanHerbert had knowledge of the presence of the charged cocaine and that it was in his immediate possession or control. Here, we know there was no proof even offered

to show VanHerbert was seen exercising any type of control over the drugs found secreted in this home.

On the other hand, what we had was circumstantial evidence of VanHerbert's presence in the home and the presence of the drugs from which the inference of possession by him was sought to be established. So postured, any inference of possession by VanHerbert in this case is, and was, clearly too weak to remove all reasonable doubt. This is particularly so in this case since the proof beyond a reasonable doubt standard, by which the proof must pass muster, actually requires the exclusion of all reasonable doubt. And, that standard has not been met here.

Even this is not all, the defense proof, which included the judicial confession by VanHerbert's son that the

contraband here was solely his, can hardly be said to have been so implausible or improbable as to have been beyond belief.

The bottom line on all this is that the evidence in this Record is also insufficient to sustain a conviction for the unlawful possession of cocaine. This follows because the prosecution failed to prove the accused had the contraband under his immediate dominion or control. Now granted possession may be actual, requiring an act of physical dominion over the item involved, or it may be constructive, which may, in some circumstances, be inferred from one's exclusive control of the premises where the item was found.

Granted, both possession and knowledge may be proved by circumstantial

evidence. And, it is a fact that where possession is proven, there are some circumstances under which knowledge can be inferred. Still it is the law (even in prosecution-oriented States like Ohio) that suspicion, no matter how strong, is insufficient to establish any of the elements of unlawful possession or any other crime.

Also, in this case it seems clear enough the doctrine of actual possession is not an issue. This follows because there is no way the facts here could possibly be tortured to support a finding that VanHerbert was seen or was found by the police to be in actual possession of the charged contraband. Hence, the contention has to be made by the State that the proof here shows circumstantially the defendant had, of course, constructive possession.

So postured, what is most important here is that VanHerbert was not alone in the home when the contraband was discovered. And, the proof showed other adults lived in the home. Further, it shows still others had ready access to the area where the contraband was located. Simply put then, the fact that the drugs were found in a place that was easily accessible to a number of people hardly supports a finding of VanHerbert's guilt beyond a reasonable doubt. This follows since the only evidence upon which the State could possibly rely is circumstantial and under the laws of Ohio, such proof must exclude any possible reasonable inference consistent with innocence.

On the other hand, the proof here at best shows the small quantity of drugs found in the search was actually

discovered secreted in the basement of the home. There was no evidence as to how long it had been there. Undeniably it could have been put there at any time by anyone who had access to the area. Thus, it is a valid argument that the State's burden of proof had to include a showing that no one other than VanHerbert was responsible for the narcotics being found on the premises. When viewed in this sense, it follows that for the accused to prevail under these circumstances it was unnecessary for him to allege or prove someone other than himself was guilty.

Hopefully it is enough to say that others who occupied and frequented these premises had the opportunity to place the contraband where it was found. This being so, there is no way the petitioner's presence in the home when

the contraband was found can be said to supply all of the elements of the crime of possession as charged in the indictment.

So postured, any conviction of the accused would perforce be predicated on conjecture, speculation and surmise to an extent that would violate due process.

ARGUMENT NO. IV

Due Process And A Fair Trial Are Denied An Accused When The Prosecutor Wilfully Makes An Egregious Argument, Which Misinforms And Misadvises The Jury On An Issue Critical To The Defense.

The argument here being made is that the prosecution has to be charged with knowing that possession of "drug abuse instruments" is a crime under the laws of the State of Ohio. See, R.C. of Ohio, §2925.12. And, it can hardly be argued

this prosecutor was totally unaware that possession of such material also translates into the offense known as "possession of criminal tools," R.C. of Ohio, §2923.24. Also see, State v. Miles, 8 Ohio App. 3d 410 (1983).

Once we credit our trial prosecutor with knowing the law (as the prestige of her office and upon which jurors really place undue confidence in) our point is really made. Simply put, the assailed argument was wilfully made because (as is usually the situation with egregious comments of this ilk) the risk of receiving the usual slap on the wrist from a reviewing Court was mightily outweighed by the fact that the unentitled advantages acquired thereby were apparently needed to insure a conviction. These, of course, were so very capable of making it less likely the

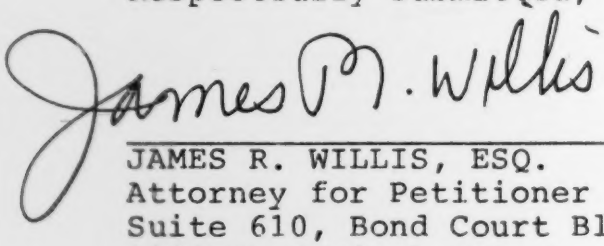
accused could avoid conviction as to make the risk worth taking. All this makes it most clear the gamble was wilfully taken that even if an objection was sustained, the case here, the rewards made this type of gamesmanship well worth the risk.

The irrepressible upshot of all this makes it most manifest that this petitioner was denied a fair trial.

CONCLUSION

For all of the reasons argued above, it is urged that the Court should grant the Writ prayed for to the end that this cause can be reviewed and reversed.

Respectfully submitted,



JAMES R. WILLIS, ESQ.
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(216) 523-1100

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ of Certiorari was mailed to the office of Lynn Slaby, Summit County Prosecutor, City-County Safety Building, 53 East Center Street, Arkon, Ohio 44308, this 23rd day of November, 1987.

James R. Willis

JAMES R. WILLIS, ESQ.
Attorney for Petitioner

APPENDICES

THE SUPREME COURT OF OHIO
COLUMBUS

1987 TERM

To wit: September 23, 1987

State of Ohio, Appellee,	:	Case No. 87-1164
v.	:	E N T R Y
Robert VanHerbert, Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Summit County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion fee, $20.00, paid by James R. Willis.

THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 23rd day of September, 1987.

MARCIA J. MENGEL CLERK

RITA A. JACKSON DEPUTY

STATE OF OHIO)		IN THE COURT OF
)SS:		APPEALS
COUNTY OF SUMMIT)		NINTH JUDICIAL DISTRICT
STATE OF OHIO	)	C.A. NO. 12798
	)	
Plaintiff-Appellee	)	APPEAL FROM
	)	JUDGMENT ENTERED
v.	)	IN THE COMMON
	)	PLEAS COURT
ROBERT VANHERBERT	)	COUNTY OF SUMMIT
	)	OHIO
Defendant-Appellant	)	CASE NO. CR 85
	)	12 1401

DECISION AND JOURNAL ENTRY

Dated: May 13, 1987

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

MAHONEY, J.

Robert VanHerbert appeals his conviction for one count of aggravated trafficking of controlled substances, R.C. 2925.03. We affirm.

FACTS

Pursuant to a search warrant, officers from the Akron Police Department conducted a search of the premises located at 994 Delia Avenue on November 1, 1985. The officers discovered and confiscated nineteen grams of cocaine, some marijuana, various items of drug paraphernalia, various documents and records, $7,400 in cash, and several items of stolen property.

VanHerbert and two other individuals were on the premises at the time of the search. VanHerbert was arrested and charged with one count of aggravated trafficking and, subsequently, two counts of receiving stolen property.

Prior to trial on the matter, VanHerbert moved the trial court to suppress the evidence seized from 994 Delia Avenue. He also sought return of

much of the seized property. These motions were renewed throughout the trial.

The trial court granted VanHerbert's motion to supppress evidence of stolen property found on the premises. The trial court consistently denied suppression of most of the remaining evidence and denied the return of any evidence seized, subject to further proceedings.

After a trial by jury, VanHerbert was convicted of the aggravated trafficking charge and sentenced. This appeal followed.

ASSIGNMENTS OF ERROR

"I. The court erred in denying the defendant's motion to suppress and for the return of illegally seized property.

"II. The court erred in failing to articulate on the record the essential findings it relied on in determining, e.g., (a) that probable cause existed for the issurance

[sic] of the warrant, (b) that the entry was lawful and (c) that certain monies and other property seized from the home and the accused was constitutional.

"III. The court erred in denying the defendant's motion to suppress and for the return of illegal [sic] seized property made at the conclusion of all the evidence."

In all three of these assignments of error, VanHerbert challenges the propriety of the trial court's rulings on VanHerbert's various motions to suppress the introduction of evidence seized at 994 Delia Avenue. Since the issues involved are similar, we will address these assignments together.

Regarding assignment of error number two, we agree that an order simply granting or denying a pre-trial motion to suppress, without articulating the essential factual findings upon which it is based, is facially erroneous. Akron v. Milewski (1985), 21 Ohio App. 3d 140,

142; Crim. R. 12(E). However, the trial court adequately articulated its factual findings on the record in the case at bar. (T. Suppression Hearing, pp. 197-201).

Assuming arguendo that the trial court had failed to adequately articulate its factual findings, VanHerbert did not call this to the court's attention. Under such circumstances, we need not consider any resulting error on appeal. See State v. Holden (1985), 23 Ohio App. 3d 5.

VanHerbert contends that all of the evidence seized at 994 Delia Avenue should have been suppressed and the property returned to its owners because the search warrant was obtained through fraud, the officers improperly entered the premises, and the search exceeded the scope of the warrant. We do not agree.

VanHerbert does not contend that the factual statements contained in Officer Miksch's affidavit are inadequate to establish probable cause. Rather, he argues that Officer Miksch lied about the existence of a confidential informant.

At best, VanHerbert's evidence created a question of fact as to whether the warrant was obtained through fraud. We have consistently held that the determination of facts in a suppression hearing is for the trial court to make. See State v. Lowe (Jan. 11, 1984), Summit App. No. 11253, unreported; State v. Moran (May 4, 1983), Summit App. No. 10827, unreported. Competent and credible evidence, in the form of the testimony of Officer Miksch, exists to support the trial court's finding that no fraud occurred.

The parties agree that the officers forcibly entered 994 Delia Avenue by

breaking down the doors. The officers testified that their presence was announced and a few seconds later they forcibly entered the premises, having received no response from within.

R.C. 2935.12 governs forcible entries and provides in pertinent part:

> "'When *** executing *** a search warrant, the officer *** may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his intention to make *** such search, he is refused admittance, ***.'"

While the statute requires that a refusal must be received before police officers forcibly enter a premises, this requirement need not be strictly followed in the presence of exigent circumstances. State v. Roper (1985), 27 Ohio App. 3d 212. Narcotics are easily disposed of. This fact constitutes an exigent circumstance, permitting police officers

to sometimes deviate from the requirements of R.C. 2935.21. Id. Considering the totality of the circumstances at bar, we agree with the trial court that the police officers acted reasonably.

In his continuing motions, VanHerbert also sought the release of various items confiscated by the officers. Clearly, the trial court did not err in denying the release of items properly confiscated by the officers. As to the other items that the trial court held were improperly seized, VanHerbert never established any possessory interest in these items. Hence, the trial court did not err in denying their release to VanHerbert. See R.C. 2933.41; State v. VFW Post 3562 (Jan. 14, 1987), Summit App. No. 12600, unreported.

Even considering the additional evidence produced at trial in support of

VanHerbert's motions, we find no error by the trial court. Assignments of error numbers one, two and three are overruled.

ASSIGNMENT OF ERROR IV

> "The court erred or abused its discretion by admitting as substantive proof considerable testimony that related to certain asserted prior acts and other offenses."

In this assignment of error, VanHerbert contends that the trial court erred in permitting the rebuttal testimony of Agin Rashad. Rashad is an employee of the Ohio Bureau of Criminal Investigation and Identification. He testified regarding an investigation he conducted for the Akron Police Department, wherein he bartered with VanHerbert for drugs. 994 Delia Avenue was the location where Rashad's meetings with VanHerbert took place.

A trial court is granted discretion in admitting evidence out of order. R.C.

2945.10(D). Absent a patent abuse of that discretion, the decision of the trial court to vary the order of evidence will not be disturbed. State v. Graven (1978), 54 Ohio St. 2d 114, 115. We find no such abuse here.

VanHerbert's evidence at trial indicated that he had no knowledge of the existence of the cocaine at 994 Delia Avenue and, consequently, did not possess such. His son, Brent Hubbard, testified that the cocaine was his own and that he intended to sell it to another.

Agin Rashad's testimony was designed to rebut VanHerbert's evidence by showing a similar previous "scheme, plan, or system," to wit: selling cocaine and other drugs from 994 Delia Avenue.

Since the identity of the perpetrator was an issue at trial, we find the testimony of Agin Rashad to be admissible. See R.C. 2945.59; Evid. R.

404(B); State v. Eubank (1979), 60 Ohio St. 2d 183. In so holding, we note that Rashad's testimony concerned offenses committed by VanHerbert in a time period reasonably near to the offense at bar and that a similar "scheme, plan or system was utilized to commit both the offense at issue and the other crimes." Eubank, 60 Ohio St. 2d at 186 (quoting State v. Curry (1975), 43 Ohio St. 2d 66, 73).

The trial court provided a limiting instruction to the jury and did not abuse its discretion in admitting Rashad's testimony out of order.

ASSIGNMENT OF ERROR V

> "The court erred when it denied the defendant's motion for judgment of acquittal made at the close of all the evidence, since the proof was insufficient to support a finding of guilt beyond a reasonable doubt."

VanHerbert essentially contends that the State failed to establish that

VanHerbert possessed the cocaine found at 994 Delia Avenue, beyond a reasonable doubt. We do not agree.

Officer Miksch testified that VanHerbert informed the officer that he had been warned that the search of 994 Delia Avenue was going to be conducted, that he had forgotten to remove the cocaine found on the premises, and had said to the officer, "you got me good this time." Additionally, the testimony of Agin Rashad indicated that VanHerbert had previously sold cocaine from the premises. Reasonable minds could infer from this evidence that VanHerbert possessed the cocaine in controversy. Eubank, 60 Ohio St. 2d at 186.

It is axiomatic that we will not re-try those issues that were before the jury. Our review is limited to a determination of whether the evidence

presented, "if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The weight to be afforded the evidence and the credibility of the witnesses are matters for the trier of fact." State v. Glenn (1986), 28 Ohio St. 3d 451, 456 (Citations omitted).

We find that the record contains ample evidence as to each essential element of the crime as charged. Average minds could conclude that VanHerbert was guilty beyond a reasonable doubt.

ASSIGNMENT OF ERROR VI

> "The prosecutor's egregious argument, which wilfully misinformed or misadvised the jury (i.e., that it was not against the law to have drug paraphernalia [R.C. of Ohio, Section 2925.12] or criminal tools [R.C. of Ohio, Section 2923.24] in one's possession) denied this accused a fair trial."

In reviewing allegations of prosecutorial misconduct in closing

arguments, the reviewing court must first determine "whether the remarks were improper and, if so, whether they prejudically [sic] affected substantial rights of the defendant." State v. Smith (1984), 14 Ohio St. 3d 13, 14. We have previously held that "(i)solated comments will not constitute prejudicial error sufficient to warrant reversal of a conviction unless those comments taken as a whole deprived the accused of a fair trial." State v. Conley (Oct. 23, 1985), Summit App. Nos. 12038/12062, unreported.

In the case at bar, the prosecutor's comments may have misinformed the jury regarding the law concerning possession of drug paraphernalia and criminal tools, not issues in this case. These isolated comments were extremely brief and the court sustained VanHerbert's objection.

We do not find that VanHerbert's substantial rights were prejudically [sic] affected or that he was deprived of a fair trial.

SUMMARY

VanHerbert's assignments of error are overruled. The judgment of conviction is affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall

be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

EDWARD J. MAHONEY
FOR THE COURT

QUILLIN, P.J.
BAIRD, J.
CONCUR

APPEARANCES:

LYNN SLABY, Prosecuting Attorney, City-County Safety Bldg., Akron, OH 44308 for Plaintiff.

JAMES R. WILLIS, Attorney at Law, Bond Court Bldg., Suite 610, 1300 E. Ninth St., Cleveland, Ohio 44114 for Defendant.